

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 28/2010

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE McINTOSH JA**

HARRY DALEY v R

Mrs Valerie Neita-Robertson and Miss Deborah Martin for the appellant

Dirk Harrison and Miss Kerri-Ann Kemble for the Crown

21, 22, 23 January and 8 March 2013

PANTON P

[1] The appellant, a superintendent of police with over 31 years' service in the Jamaica Constabulary Force at the time of his trial, was convicted on 16 December 2009 in the Corporate Area Resident Magistrate's Court, of a breach of section 14 (1)(a) of the Corruption Prevention Act. He was sentenced to 18 months' imprisonment. The trial commenced on 20 April 2009 and occupied 30 days over the following eight months.

The nature of the charge

[2] The particulars of the charge that form the basis of the conviction read:

“Harry Daley being a public servant on the 31st of July 2008 corruptly accepted the sum of \$15,000.00 from Tafari Clarke for doing an act in the performance of his public function to wit; to offer protection to Tafari Clarke and his premises which were under threat by one ‘Terry’.”

The question for the trial court to decide

[3] There is no doubt that on the date in question the appellant received from Tafari Clarke the sum of money mentioned in the information. The question that the learned Senior Resident Magistrate had to decide was whether it was received as a reward for protecting Tafari Clarke and his premises; and whether Tafari Clarke and his premises were under any form of threat of harm from an individual named Terry.

Summary of the prosecution’s case

[4] Tafari Clarke is the nephew of one Leonard Miller who built a small shopping plaza, called Bongo’s Plaza, in an area known as Charlemont on the main road between Linstead and Ewarton, St Catherine. Leonard Miller died approximately ten years ago. His death created a vacuum in the management of his enterprise. It is this vacuum that has given rise to the instant proceedings. Tafari’s father is Linton Clarke (popularly called Coffee Tea) who was a brother of Leonard Miller. After Leonard died, his son, Leonard Miller Jnr took control for a while but he too passed away. Thereafter, another brother of Leonard Miller called Linford Clarke (popularly known as Roy) took over and collected the rent. Linford was succeeded in the rent collecting task by a Justice of the

Peace named Herbert Garriques who is not only a teacher but an unofficial financial advisor.

[5] Tafari Clarke went to the United States of America while he was a child. Misunderstandings seemed to have developed between him and some family members there so he left. Eventually, he went to the United Kingdom where he had his name entered in the criminal records for drug offences for which he was sentenced to five years imprisonment and deported to Jamaica. While in the United Kingdom, he applied for asylum but was unsuccessful. Having been deported to Jamaica, he reconnected with some of his family members including his father Linton. He eventually took control of the collection of rental from Mr Garriques.

[6] The prosecution alleged that while Tafari Clarke was in control of the rental collection, he and his premises (the plaza) came under threat from Terry (whom some witnesses know as Kerry) and that the appellant offered protection from these threats at a price which he extracted monthly from Tafari Clarke. The prosecution presented at the trial recordings (video and audio) which, it is claimed, substantiate the allegations of Tafari Clarke.

The appellant's case

[7] The appellant, on the other hand, contended that the financial transactions were perfectly legitimate in that he had loaned the deceased Leonard Miller \$250,000.00 and that Tafari Clarke had merely been continuing a process of repayment that had been started before he took over the responsibility of collecting the rent. Further, it was

contended on behalf of the appellant that Tafari Clarke was an unstable, untrustworthy person who was hell-bent on leaving Jamaica even if it meant going the route of the witness protection programme, and that implicating a senior police officer in criminal conduct was one means by which he could achieve his ends. The appellant also contended that there were deletions of portions of the recordings thereby giving a distorted picture of the transactions between himself and Tafari Clarke.

The appeal

[8] The question on appeal is whether the learned Senior Resident Magistrate was correct to have preferred the evidence of the convicted drug smuggler over that of the appellant, a senior police officer, a retired senior superintendent who vouched for the appellant's honesty, and two Justices of the Peace who gave evidence that they knew of the loan transaction.

The evidence presented by the prosecution

[9] Det Inspector Paul Thomas gave evidence that on 1 June 2007, while he was a detective sergeant stationed at the Spanish Town Police Station, the appellant who was then the commanding officer for the parish called him into his office and introduced Tafari Clarke, whom he did not know. The appellant said that Tafari Clarke was having problems with collecting rent from a particular business place in Linstead, St Catherine. The appellant instructed the witness to deal with the matter. Inspector Thomas took Tafari Clarke to his office and interviewed him. As a result of the interview, he contacted one Kerry of Bronx St, St Catherine. Having made contact, he arranged for a

meeting with both Clarke and Kerry, whom he said is also called Terry. The inspector later learnt that the business place referred to was Bongo's Plaza.

[10] Later that day, Inspector Thomas informed the appellant that he had advised the parties (Clarke and Terry) that the matter was civil in nature and that they should proceed to the civil court. However, he told the appellant that he had also told them that if there were any further problems, they should contact the appellant, or Inspector McDonald the sub-officer in charge at the Linstead Police Station.

[11] Inspector Thomas, under cross-examination, said that prior to 1 June 2007, he had investigated claims by Tafari Clarke for asylum to see whether his claims were credible. Correspondence had been addressed to the inspector for his attention in this regard. He said he had carried out an investigation as to whether Tafari Clarke was under threat as he had alleged. His report consequent on his investigation was to the effect that there was no basis for Mr Clarke's claim. It is assumed that the threat being referred to here was that which would have formed the basis for the grant of asylum by the authorities in England.

[12] Inspector Norman McDonald was the sub-officer in charge of Linstead Police Station from June 2007 to June 2008. Some time during June 2007, the appellant telephoned him saying that he was sending Tafari Clarke to him with a matter and he, the inspector, should sort it out. Later that day, he had a meeting in his office with Tafari Clarke, his father Linton Clarke (Coffee Tea), a lady whom Tafari introduced as his aunt and "a gentleman named Terry from a 4th St address in Linstead". Inspector

McDonald said he communicated with the appellant and told him that he had dealt with the matter. He had told them that the matter was civil in nature and that they should turn to the civil court. Under cross-examination, Inspector McDonald said that based on the instructions given by the appellant, he (the inspector) felt he was at liberty to exercise his own discretion in the matter, and that he had done so in a professional manner.

[13] Tafari Clarke described himself, in his evidence, as a music producer. His promotional name, he said, is "Shy". While being cross-examined, he told the Senior Resident Magistrate that he had been the holder of a "green card" as his grandmother had filed for him in 1996. He lived in the United States of America with his mother and grandmother "from age 13 to 14-15". He said he chose (never mind his age) to come home to Jamaica to his father as he and "[his] parents were not getting along" (page 135). He remained in Jamaica for a while then he went off to England where he remained "for a good while". He was unable to say for how long. He returned to Jamaica in 2007 when he was "20 odd – about 23-24 years – 23". It was in those terms that he described his age to the Resident Magistrate. While in England, he said he was "involved in the smuggling of 'A' class drugs" for which he was sentenced to five years' imprisonment. He spent four years in prison and was deported to Jamaica.

[14] Prior to his return to Jamaica, that is, while he was in England, he said that he had appointed Mr Garriques, the Justice of the Peace, to collect the rent after Leonard Miller had died in 2003. On his return, he saw Mr Garriques collecting the rent for the plaza and for a container which Leonard Miller owned in Bog Walk. Mr Garriques used

to give him money from the rental. He eventually took over the collection from Mr Garriques. According to Tafari Clarke, his deceased uncle owed him money so the family said he was to get back that money.

[15] He confirmed that he and his father Linton went to see the appellant in his office sometime in 2007. However, prior to that, he said that he had received a call from Terry that he wanted to meet him. They met in the Spanish Town Police Station yard. He said he met with Terry as, according to him, Terry is known as a bad man. This meeting was after he had gone to Inspector Paul Thomas' office, and must have been the meeting that Mr Thomas said that he had arranged. He said Mr Thomas had told him to report the matter at the Linstead Police Station and he had gone there but, according to him, he "was getting the run around" so he went to the appellant. He said that he told the appellant that Terry was bullying people in the plaza, telling them not to give him (Tafari) the money, and that he (Terry) would soon be starting to collect the money. The appellant said that he would send him to Inspector McDonald at the Linstead Police Sstation. He also said that the appellant told him he could sort it out but it was going to cost him (Tafari Clarke). The appellant then sent him to Inspector McDonald and he went with his father Linton. Also present were Terry and Patsy Clarke.

[16] Tafari Clarke said that on the day that he saw Inspector McDonald he went back to the appellant and, in the presence of his father Linton, gave the appellant \$20,000.00 as protection money to protect the plaza from Terry. After he had received the money, the appellant said that if anyone were to trouble him, Tafari, he the

appellant must be the first to know. The witness gave a statement to the police on 22 April 2008. In it, he is recorded as saying that it was at the end of the month after the meeting with the appellant that he made the first payment to the appellant. Of course, this is in conflict with his evidence that he made his first payment to the appellant on the very day that he had been to see Inspector McDonald. When shown his written signed statement, he agreed that that was written on the paper, but said he could not remember if that was indeed what he had said to the police.

[17] Linton Clarke, father of Tafari, said that after they had met with Inspector McDonald, he and his son went back to the appellant's office that very day to say thanks seeing that he had sent them to Linstead and they had got through. He said that he saw Tafari give the appellant money, but he was not able to say how much. It is important to note, however, that there is no mention in his witness statement that he saw Tafari give the appellant money.

[18] The witness Tafari Clarke said that the appellant demanded \$20,000.00 per month from him from 2007, and that he gave these monies openly to the appellant. He eventually went to the police and arranged with them for there to be recordings of communication and payments between himself and the appellant. He said that there were several events that were taped of him giving extortion money to the appellant. These occasions, he said, were part of a continuing operation starting in February 2008 and ending on 31 July 2008. However, he said that none of the recordings have any reference to "protection money" although the police had told him to take the

conversations with the appellant into that direction. He conceded that it was his "say so" that it was protection money.

[19] Tafari Clarke was cross-examined in respect of a written statement given by his girlfriend. In that statement, apparently she stated that one of the rewards that Mr Tafari Clarke has received for his allegations against the appellant is that he received money from Assistant Commissioner of Police Justin Felice to pay his rent. He added: "Not true I got \$10,000 to pay rent. She is lying" [page 166]. This is to be contrasted with the evidence of Mr Felice which will be referred to later.

[20] On one occasion when it was suggested to Mr Tafari Clarke that the money he had been giving to the appellant was in respect of money owed to the appellant by the deceased Leonard Miller, his response was as follows:

"Not true, the money that I was paying accused is not protection money, but money owed to him. My uncle was a hit man, a murderer why would accused be doing business with him." [page 165]

Mr Tafari Clarke was equally accusatory in respect of the appellant when, in re-examination, he was permitted to say the following:

"When I say I can be intimidated but it depends. Accused could intimidate me. He has all the gunmen on both sides and the police. He is a dangerous man." [page 167]

[21] The prosecution called Mr Paul Wilson, a businessman. He gave evidence that he rented three shops in the plaza, and that he has been there since 1999. He did not see Leonard Miller in the light that his (Miller's) nephew Tafari saw him. He regarded

Leonard Miller as a very good businessman who was very honest. He used to credit goods to Miller and his son and the amount would go "to the next month's rent and so on". He never knew of Miller being involved in any criminal activity. Mr Wilson said that he was aware that there were persons who had lent money to Miller, and that such monies would be recouped from the rental. According to Mr Wilson, after Miller died, he paid the rent to Miller's niece until Miller's son Leonard Miller Jnr came to Linstead and took it over. After the son died, Miller's brother Roy used to "oversee the building" until Mr Garriques was appointed. In 2007, he started to pay the rent to Tafari Clarke. He said an issue arose when someone else (presumably Terry) came to him and said that the rent was to be paid to him. He said he was called to a meeting at the Linstead Police Station by an officer. Present at the meeting were Tafari, Tafari's father, Tafari's aunt Patsy and Terry. Mr Wilson said that at that meeting he gave the rent to the police officer who handed it to Tafari. He said that the issue as to whom the rent was to be paid was resolved satisfactorily, and it appeared to him that everybody left satisfied.

[22] The information on which the appellant was tried was laid by Assistant Commissioner of Police Justin Felice. He said that he was introduced to Tafari Clarke by a Deputy Commissioner of Police. As a result of the allegations made by Tafari Clarke, he decided that "a proactive covert investigation should take place" [page 20]. This decision was taken on either 27 or 28 February 2008. Thereafter, with the assistance of three other members of the constabulary (Inspector Clunis, Corporal Lenworth Lewis and Constable Nigel Pencil) several taped conversations and video recordings were made of activities between the appellant and Tafari Clarke.

[23] On 22 April 2009, while being cross-examined, Asst Commissioner Felice said that he was aware that Tafari Clarke had made an application for asylum in Britain. He regarded the fight against deportation as the same as an application for asylum. The exact words he used were:

“When we say he fought deportation to Jamaica and is seeking asylum we are referring to the same thing.”
[page 31]

The appellant’s attorney-at-law sought information as to the year of the application for asylum but the prosecution objected. There followed legal submissions after which the adjournment was taken. On resumption on 23 April 2009, two other witnesses were taken; the matter was adjourned to 27 April 2009 when permission was granted for further cross-examination of one of those witnesses to be done and this was followed by the completion of the examination in chief of the other witness as well as his cross-examination. There followed the evidence of Mr Tafari Clarke as well as the holding of a *voire dire*. It was not until 28 July 2009 that Mr Felice returned to the witness stand. In response to further questions on the matter of asylum having been sought by Tafari Clarke, Mr Felice said that he was not convinced that the asylum information was important to the case being tried by the Senior Resident Magistrate. Indeed, he regarded it as irrelevant to the case. He said this:

“Disclosure having been requested of me I made no checks in relation to asylum” [page 190].

[24] It will be recalled that Tafari Clarke had denied receiving money from Mr Felice to pay his rent. However, Mr Felice said this:

“True, I had occasion to give Tafari Clarke \$10,000 because his rent money had been spent.” [page 190]

Mr Felice, however, did say that it was a loan which has been repaid.

[25] Mr Felice said that when he interviewed Tafari Clarke, the latter told him that he was the joint owner of the plaza. He did not have any information that Tafari Clarke was collecting the rent for payback of money that he had sent to his deceased uncle.

[26] There was one other significant aspect of the case on which Mr Felice gave evidence. He said that he had the appellant’s house searched in the appellant’s absence, that is, while the appellant was, to Mr Felice’s certain knowledge, in custody at Horizon Park. He (Mr Felice) was not present at the search. However, he said that all the items taken from the house were documents.

[27] The other witnesses for the prosecution gave evidence in relation to the recordings of conversations, the custody of the tapes and the arrest of the appellant on 31 July 2008. In respect of the recordings, there was evidence from Corporal Nigel Pencil that he downloaded the recording to a computer, he then “burned the recording to a CD writable compact disc” and then “made a copy and simultaneously played the copy along with the recording on the phone so as to satisfy [himself] that they were the same”. He said: “Some of the recordings were transcribed in its fullness, whilst others, bits were transcribed – meaning what I considered relevant to the case”.

The defence challenged the corporal that the recordings did not contain all that was said on the various occasions in the conversations between the appellant and Tafari

Clarke. Specifically, it was alleged that there were deliberate omissions. At first Corporal Pencil said:

"I have not deliberately omitted any of the recordings in the transcripts. Not all the words on the tape have been reduced to writing in the transcript."

Later, he said:

"I now say I deliberately left out portions of the recording because of their irrelevance to the case. I decided what was to be reduced to the transcript and what was not to be reduced to writing."

The evidence presented on behalf of the appellant

[28] The appellant took the witness stand on 31 August 2009 and gave evidence over a period of four days ending on 3 September 2009. He spoke of his long service in the constabulary and the fact that he had received over 20 commendations, the last being in 2006. Some of the commendations, he said, were in relation to the reduction of crime especially murders in the divisions in which he has worked. He said that he has had a lifelong friendship with Linton Clarke, but they fell out in 2007 due to Linton's life style and his association with a certain politician. He said that Linton came to him in 2008 seeking assistance to get a house from Food for the Poor, and that two weeks before his arrest he had given Linton Clarke \$10,000.00 to assist him with medical treatment. He had also given him a cheque for \$10,000.00 in either February or March 2008 to prepare the house spot in Bog Walk.

[29] The appellant said that in October 2003, he lent \$250,000.00 to the deceased who was involved in block-making. An agreement was prepared by a Justice of the

Peace. It was signed by the deceased, the appellant and a Mr Kerr, the Justice of the Peace. The deceased who lived in Charlemont took the document to his neighbour Mr Morgan, a Justice of the Peace for him to examine it and give him the benefit of his advice. The Justice of the Peace examined the document and wrote terms of repayment on the back thereof. Up to 31 July 2008, according to the appellant, this document was at his home, along with other documents, secured in a drawer. Notice to produce this document has been served on the investigating officer, but it has not been produced.

[30] According to the appellant, the agreement required the deceased to make an initial payment of \$20,000.00 in January 2004 and thereafter a payment of \$10,000.00 per month for a period of two years. Miller died shortly after the arrangement had been made, so the payments did not commence as scheduled. The family of the deceased, spearheaded by Roy, decided that they would honour the debt to the appellant, as well as the debts owed by the deceased to other persons. In 2005, he received \$30,000.00 from Leonard Miller Jnr but he too died soon after. The appellant said he kept a record of the payments in his diary, but some of his diaries are with the police. A new arrangement was made with Roy in respect of the payment of the remaining sum. Roy was succeeded by Mr Garriques, the Justice of the Peace, who was to pay \$10,000.00 per month until the balance of \$220,000.00 had been satisfied. The appellant said that he met with Mr Garriques who gave him a total of \$60,000.00 over a period of six months.

[31] In May 2007, Tafari Clarke came into the picture and made his first payment to the appellant. Tafari Clarke did not pay the appellant each month. The payments should

have ended in August 2008. However, no payment was made in November 2007 or May 2008 and on one other unspecified date.

[32] At the time the appellant made the loan to the deceased Miller, the appellant said that he had borrowed money from his credit union and was going to pay labour bill in Portland that day. He had been supervising the construction of a house in Portland. That house belonged to the appellant and his wife. The credit union loan was repayable over a period of three years. The loan to the deceased Miller was towards the upgrading of Miller's block factory. The agreement that he said he signed with Miller was done at the Constant Spring Police Station. The appellant said that he did not know Terry, and he denied having any arrangement with Tafari Clarke for the payment of protection money. He regarded Tafari Clarke as nothing more than a professional ginnal.

[33] The appellant not only exercised his right to give evidence; he called witnesses. The first of such witnesses was Mr Herbert Garriques who described himself as a financial advisor. He said he was a teacher by profession, mathematics being his area of expertise. At the time of the trial of this matter, Mr Garriques had been one of Her Majesty's Justices of the Peace for the parish of St Catherine for over 19 years. His association with Bongo's Plaza commenced in 2005, when Roy asked him to collect rent on behalf of the family. He reported directly to Carlene Bailey the "baby mother" of the deceased. He collected rent from the plaza as well as in respect of the container in Bog Walk. Carlene gave him instructions as to how the money was to be distributed. Among the persons to whom money was to be paid was the appellant. He was to receive

\$10,000.00 per month until \$220,000.00 had been paid off. He said that through Mr Paul Wilson (tenant who gave evidence for the prosecution) he learnt that Leonard Miller Jnr owed him \$400,000.00 for goods he used to take and pay for on a monthly basis. Another tenant, a Mr Graham, was also owed \$125,000.00 for work done on the building in the part that he occupied. Mr Garriques said that on one occasion he had to send \$50,000.00 which was converted into US\$ through Western Union to the son of the deceased who was in college in the United States of America. Due to pressing demands from family members of the deceased (such as Carlene Bailey) and also due to a poor cash flow situation, Mr Garriques said that at times he had to ask the appellant to wait for his reimbursement. He paid a total of \$60,000.00 to the appellant, the last payment being in April 2007.

[34] There came a point in time when Mr Garriques said he had become very uncomfortable with the complainant, Mr Tafari Clarke. The latter was pressing him to find someone who could buy him (Clarke) a visa for the United States or Canada so that he could use it to get back to England. Mr Garriques said that he found the request strange and did not like it as that is not part of his style. He said that Tafari started to get close to him, calling him names like "Dads" and "Boss" and he did not like it. After a couple of months' association with Tafari Clarke, he (Mr Garriques) did not like Tafari's tone. He gave details of the rent that he collected and the sums that he paid out. He said that he stopped collecting the rent because he learnt that Tafari and Terry were having problems as to who should be receiving the rental payments. Terry, he said, had told him that he and the deceased Leonard Miller were business partners. He also said

that Terry had told him that he did not want anything from the business, and was just checking as he wanted things to run smoothly. Terry is also supposed to have told Mr Garriques that he was glad someone decent was collecting the rent.

[35] In view of the disagreement on who was to receive the rent, Mr Garriques decided that the situation was not for him, and he gave the book with the record of payments from November 2005 to Tafari. The book, he said, had everything in it – income and expenditure. The responsibility was passed over to Tafari on the instruction of Carlene Bailey.

[36] William Morgan, a retired teacher, who has been a Justice of the Peace and lay magistrate since 26 June 1984, also gave evidence on behalf of the appellant. He said that he had known Leonard Miller for over ten years. They were neighbours, and he used to advise Miller from time to time. He said that in 2003, the appellant, whom he did not know before, and Miller came to his house. Miller, he said, wanted him “to ascertain” a receipt concerning a loan that the appellant had made to him to improve his block factory. Mr Morgan said he noticed that the receipt was for \$250,000.00, and he told Miller that there should be an agreement to say how the loan would be repaid. Miller told him “to write something for him”. However, seeing that it was a Sunday, he told them that Sunday was a day that he set aside for his family and his God, and nothing else. He advised them to return the next day, before he went to school, that is, before ten o’clock. The men followed that instruction.

[37] Mr Morgan advised Miller, and the appellant agreed with the advice – that Miller would pay the appellant \$20,000.00 at the end of January 2004, and \$10,000.00 per month thereafter. Mr Morgan said he wrote this on the back of the receipt. Both men signed it and he witnessed and stamped it with his “Justice stamp” before giving it to the appellant.

[38] Retired Senior Superintendent of Police Dudley Bryan also gave evidence. His was in respect of the character of the appellant whom he found straightforward and hardworking; a man of his word and someone on whom one can rely. He said he had no problem whatsoever with his honesty, and he found him as one who inspired the men under his command. The allegations by the prosecution are not in keeping with the person Mr Bryan knows the appellant to be.

The findings of the Senior Resident Magistrate

[39] The learned Senior Resident Magistrate made specific findings which she numbered up to 20. The most important ones may be listed thus:

- i. That Bongo’s Plaza was not owned by Tafari Clarke but rather by his deceased uncle Leonard Miller Snr, who died in 2003.
- ii. Upon his death, the persons who collected rent from the shops included Tafari Clarke and Mr Garriques.
- iii. That when Tafari Clarke began collecting rent from the plaza in 2007, the only persons claiming money from the rental were his grandmother Lucille Beech, Carlene Bailey the ‘baby mother’ of the deceased owner and Tafari Clarke.

- iv. That there was a meeting with the appellant at the Spanish Town Police Station where Tafari Clarke complained about the bullying of tenants by Terry and the appellant told Clarke that he could deal with the problem but it would cost him.
- v. That after the meeting with Inspector McDonald, Tafari Clarke returned to the office of the appellant and reported what had transpired in Linstead.
- vi. At the time the report was made to him, the appellant enquired how much money was earned from the plaza monthly, and asked for either \$20,000.00 per month or a shop in the plaza.
- vii. That the appellant knew Terry, at least by name, and sent a message to him by Tafari Clarke.
- viii. That the money being paid by Tafari Clarke to the appellant was not to settle a loan made to Leonard Miller.
- ix. That Tafari Clarke is a witness of truth.

[40] In her reasoning, the learned Senior Resident Magistrate acknowledged that evidence had been led which cast the appellant in a bad light, contrary to the rules of evidence. The main witness had referred to the appellant being a dangerous man who had the gunmen of both sides and the police on his side. The Senior Resident Magistrate said that she had disabused her mind of the statements so that no prejudicial or adverse inference can unfairly be drawn against the appellant. In fact she listed eight instances of prejudicial evidence that had been given:

- i. that the appellant was charged with rape;
- ii. that the appellant was issued with a warning letter by his superiors;
- iii. the appellant's conflict with the military;
- iv. the appellant's transfer to 'Never Never Land';
- v. the statement by Linton Clarke that the appellant smoked ganja;
- vi. the statement by Tafari Clarke that the appellant was a dangerous man;
- vii. the statement that Leonard Miller was a killer and hit-man wanted by the FBI so the appellant should not have been doing any business with him; and
- viii. a statement by Tafari Clarke that the appellant intimidated him as he had all the gunmen from Clansman and One Order gangs.

[41] The Senior Resident Magistrate categorized Tafari's claim to ownership of the plaza as "a discrepancy but not material and or sufficient to undermine the Crown's case". She found Mr Garriques' evidence incredible as regards "the number of things he did from the proceeds of the rent over the period of time he collected it". She ridiculed his ability in relation to mathematics notwithstanding that he was a teacher of that subject. As regards Terry, she said that the only reference to Terry in the case is in relation to rent collection, so she said she found it not unreasonable to conclude that the money (the accused was receiving) had to do with Terry.

[42] The learned Senior Resident Magistrate drew an adverse inference from the fact that the appellant was claiming that there was a loan agreement and notations in diaries yet they “were never produced to substantiate this”. She “wondered seriously whether [Mr Morgan, the Justice of the Peace], [had] actually read any document at all or was making up his evidence” [page 385]. In the end, she said she found it “difficult to accept the existence of the loan agreement between the accused man and the deceased man in the terms spoken of by both the accused and Mr William Morgan” [page 388]. She said that it seemed to her that the defence was being developed and changed as the case unfolded. “It was not a consistent defense [sic] sustained throughout the case” she added [page 385].

The grounds of appeal

[43] The original grounds of appeal challenged the conviction on the basis that it was unreasonable having regard to all the evidence. The following supplemental grounds were filed:

“GROUND 1

1. That the Learned Resident Magistrate erred in ruling in favour of the Crown having heard their response to the Defence’s application for disclosure, that their election to withhold information relating to the functioning of the recording device on the basis that said disclosure would infringe public interest immunity:

- a. Without hearing the material of the competing public interest or competing aspects of the public interest from a competent source within the relevant organization;

- b. Without demonstrating that she did a balancing act and/or an independent assessment to determine what effect, if any, the withholding of the disputed material would have in proving the Defendant's innocence or in the avoidance of a miscarriage of justice; and
- c. In allowing the trial to proceed having ruled for non-disclosure with adverse consequences to the Defence as they were not permitted the access and the necessary disclosure to mount a considered legal challenge.

Wherefore it is submitted that the appellant was not afforded the facilities necessary to have a fair trial and hence the conviction and sentence flowing from this process should be set aside and quashed.

GROUND 2

- 2. That the learned Resident Magistrate erred in ruling that:
 - a. That the requirements of section 31 (G) and (H) of the Evidence Act could be adequately challenged by the Defence without the Defence having any actual knowledge and/or disclosure of the computers/devices used during the recording and copying exercises;
 - b. That issues relating to provenance, authenticity and accuracy could be adequately tested in a voir dire without access and/or disclosure on the relevant devices used in the exercise sought to be challenged.

This was especially egregious as the evidence of witnesses is that there was material not captured on

both the audio and video recordings and said material was of importance to the Defence.

Wherefore it is submitted that the appellant was not afforded the facilities necessary to have a fair trial and hence the conviction and sentence flowing from this process should be set aside and quashed.

GROUND 3

3. That the Learned Resident Magistrate's Finding of Fact, listed at (No. 8) in the Findings on page 355 of the bundle, 'That when Tafari Clarke began collecting rent from the plaza in 2007 the only persons claiming money from rental were Lucille Beech and Carlene Bailey...' is not supported by the totality of the evidence as the unchallenged evidence showed that numerous other persons were receiving money from the rental.

That her failure to demonstrate her basis for rejecting the evidence of other witnesses inclusive of Mr. Garriques and Paul Wilson that there were other persons constitutes a non-direction resulting in a misdirection.

GROUND 4

4. That in her Finding of Fact (No. 16) at page 357 of the bundle, that the clear inference to be drawn from the actions of 'Terry' was that it amounted to a threat to the livelihood of the complainant and that resolution in the civil court as recommended was of no moment is unreasonable having regard to the totality of the evidence, in that:

- a. The only issue raised, on the evidence, was as to who should collect the rent;

- b. There was never an issue raised as to what should be done with the rent;
- c. That after the meeting all persons were satisfied with the outcome of the meeting in Inspector McDonald's office;
- d. That Inspector McDonald agreed that there was no criminal aspect to the matter that was referred to him;

Wherefore it is submitted that the Magistrate misdirected herself and hence the conviction and sentence flowing from this misdirection should be set aside and quashed.

GROUND 5

5. That in coming to her finding at (No. 17) of her Findings of Fact at page 358, the Learned Resident Magistrate does not demonstrate how she resolved the evidence as to the reasons given by the Appellant for referring the report to (sic) made to him by Tafari Clarke to other police officers, that is, that he had a financial interest in the proceeds from the rental, the collection of which was in dispute, in settlement of his loan.

That this failure to resolve this important aspect of the Defence's case constitutes a non-direction resulting in a misdirection.

GROUND 6

6. That the learned Magistrate in her Findings of Fact at paragraph (No. 20) at page 359 of the bundle, erred in finding that assertions made by the Defence that:

- a. Money paid on the 31st of July would be given to Coffee Tea;

- b. Tafari Clarke was lying as part of a plan to live overseas on the witness protection programme;
- c. Tafari Clarke was rewarded for lying on the accused;
- d. The investigating officer advanced Tafari Clarke money to pay his rent;

are rejected as being unsupported by any evidence as:

- a. There was evidence of Tafari Clarke's several efforts to get overseas and that he engaged in illegal efforts to procure travel documents;
- b. There was evidence that Tafari Clarke sought asylum and was rejected as his reason was rejected;
- c. As a consequence of his role in this trial Tafari Clarke was living overseas and it was the first time since his deportation that he had been overseas;

Wherefore it is submitted that this misdirection demonstrates her not cognizing [sic] and resolving the evidence fundamental to the defence and hence the resulting conviction should be set aside and the sentence quashed.

GROUND 7

7. That the learned Resident Magistrate though she admitted, that she had erred in allowing prejudicial and inadmissible evidence to be led during the trial in regard

to the Appellant's character and that she would have no regard to it, the prejudice was so egregious that even whilst sitting as judge alone with inherent assumptions made it would be [sic] impossible for the learned Resident Magistrate to excise this prejudice from her mind as the prejudice would have influenced how she guided or conducted her evaluation of the witnesses throughout the evidence in the trial and is further demonstrated by her utter rejection of every explanatory account given by the Accused or his supporting witnesses throughout the period, the subject of the indictment.

Wherefore it is submitted that this initial misdirection resulted in prejudice throughout the rest of the proceedings in Court as it was only on receipt of her written Findings of Fact and in the record of the Crown's address that the Parties were made aware that she had revised her ruling, resulting irreversible prejudice and an (sic) hence and unfair trial.

GROUND 8

8. That the Learned Resident Magistrate's complete rejection of the Defendant's defence, even areas not challenged as to its truth by the Prosecution through cross examination or by their suggestions contradicting it, is unreasonable.

Furthermore her analysis of the recording on the 30th of June, which on assessment having regard to the totality of the evidence is equivocal, is unreasonable in that though the recording speaks of monies and payments being made to the Appellant, it does not in any way contradict the Appellant's evidence that the monies were in furtherance of debt payment.

Wherefore it is submitted that this failure to objectively consider the evidence has resulted in an unfair trial.”

[44] At the commencement of the hearing of the appeal, a further supplemental ground of appeal was filed. It reads:

“That the Prosecution in adducing prejudicial evidence against the Appellant during the course of the trial and afterwards conceding [sic] error as to its inadmissibility, acted in a manner demonstrating prosecutorial misconduct, hence denying the Appellant a fair trial.”

The submissions

[45] The Court heard full submissions from the four attorneys-at-law appearing in the matter. We hope that the summary that we now give does justice to the thoughts behind the presentations by the attorneys.

Non-disclosure

Miss Deborah Martin complained of the refusal of the Senior Resident Magistrate to allow access to the recording devices, on the basis of public interest immunity. She said that there was no balancing exercise conducted by the Senior Resident Magistrate, to see how the non-disclosure would have impacted on the conduct of the defence. She also complained of the fact that there were deletions of material from the recordings without the prosecution disclosing what was deleted. She submitted that the appellant did not have a fair trial due to the non-disclosures, not only in relation to the recordings but also in respect of the antecedents of Tafari Clarke and the search of the appellant’s

house and removal of documents therefrom while the appellant was in the custody of the police. Miss Martin cited the case ***Regina v Ward*** [1993] 1 WLR 619 in support of her submissions.

Prejudicial evidence

The learned Senior Resident Magistrate admitted, as indicated earlier, that prejudicial evidence was admitted in evidence. Miss Martin submitted that had the Senior Resident Magistrate not allowed such evidence to be placed before her, she may well have come to a different conclusion. Miss Martin contended that prejudicial evidence permeated the entire trial, and caused the court to reject the defence in its entirety.

Rejection of credible evidence

Mrs Valrie Neita-Robertson submitted that the evidence of Mr Paul Wilson and Mr Herbert Garriques was not challenged, yet was rejected. There was, she said, "a consistent thread throughout the evidence" indicating that "lenders to Mr Leonard Miller were recouping their monies from the rent and from other businesses such as the blockmaking business operated by Mr Miller". She regarded Mr Wilson as an independent witness whose evidence was not given proper consideration by the Senior Resident Magistrate. In respect of Mr Garriques, she pointed to the fact that he had been employed by the family of the deceased.

Lack of evidence to support the information laid

Mrs Neita-Robertson submitted that the information laid means that there was some threat to the person of Tafari Clarke. That is why there was a complaint to Inspector McDonald. However, the inspector saw it as a civil dispute between Tafari Clarke and

Terry. There was no threat, said Mrs Neita-Robertson; there was only a dispute as to the collection of the rent. There was no evidence of any threat to Tafari Clarke. Mr Paul Wilson, a tenant who gave evidence, said nothing about Terry bullying the tenants. Indeed, said Mrs Neita-Robertson, there was no evidence of any hostility on the part of Terry coming from any independent witness, or from Tafari Clarke himself. She reminded the court that Tafari Clarke had no interest in the plaza, save and except for recouping his own debt. There was no evidence of any threat to Tafari's person or interest in the plaza.

Unreasonable verdict

Mrs Neita-Robertson drew the court's attention to the discrepancies in the evidence of Tafari Clarke and his father Linford Clarke, particularly in relation to the alleged payment of \$20,000.00 to the appellant after they had been to see Inspector McDonald. She referred to the character of Tafari Clarke and submitted that on the totality of the evidence, it was overwhelmingly in favour of an acquittal. She said that "the cumulative effect of all the evidence including the non-disclosure, inconsistencies, the credit of Tafari Clarke, are all in favour of the appellant; hence, the verdict is unreasonable".

The prosecution's response

[46] Mr Dirk Harrison, for the prosecution, submitted that there was no duty to produce the original devices on which the recordings were made. "The covert device and computer ought not to be disclosed", he said. The concern expressed by Mr Harrison was that such a disclosure would impair or hamper operations of the police.

The computer has sensitive information stored on it and it would be harmful to the public's interest to permit inspection and examination of it by the defence. The case, he said, turned upon credibility and the disclosure sought would not help in that regard. In relation to the other areas where disclosure was sought, Mr Harrison said that all such matters had been addressed and there was no justifiable ground for complaint by the appellant.

[47] So far as it has been submitted that the police regarded the matter between Tafari Clarke and Terry as a civil matter, Mr Harrison submitted that the view that the police held of the matter did not make it civil in nature. He said that the recording of the 30 June 2008, shows that the money was being paid for protection, and that Resident Magistrate was justified in rejecting the evidence of Mr Garriques. "The evidence adduced by the prosecution was sufficient and adequate, and the Resident Magistrate's handling of the material shows nothing faulty that would go to the root of the Crown's case", he submitted. Mr Harrison reminded us that the Senior Resident Magistrate had seen the witnesses and observed their demeanour.

[48] Miss Kemble, for her part, submitted that the admission of inadmissible evidence by the Resident Magistrate was not such as should vitiate the conviction as the Senior Resident Magistrate had given herself appropriate directions and had "demonstrated a knowledge of the law".

Analysis and decision

[49] In this country, whenever a person is charged with a criminal offence, he is entitled to receive a fair trial. Fairness involves, among other things, the prosecution not putting obstacles in the path of the conduct of the defence of the person charged, or withholding material relevant to the case. For example, where there are matters that are likely to be of importance to the defence and they are under the control of the prosecution, such matters ought to be disclosed. "The prosecution" means not just the prosecutors who appear in court but includes persons such as police officers and other state officials connected with the investigation and conduct of the case against the accused person.

[50] In this case, it is accepted by all that the credibility of Tafari Clarke was of critical importance. There was evidence that he made an application for asylum in the United Kingdom. The application was denied. There is a file in respect of this application. Disclosure of it was requested in order that the statements made to support the application could be examined. The disclosure was sought of none other than the arresting officer, Assistant Commissioner of Police Justin Felice. He decided he would make no checks in that regard. He said that he was not convinced that the asylum information was important to the case. In fact, he said in evidence that it was irrelevant. With the greatest of respect, that was not a determination for him to make. His duty was to disclose. And it was not a situation in which he was unable to disclose. The fact is that Inspector Paul Thomas who gave evidence for the prosecution said that prior to 1 June 2007, he investigated claims by Tafari Clarke for asylum. He carried out

an investigation as to whether he was under threat as he had alleged and found that there was no basis for the claim. The investigation carried out by Inspector Thomas was at the instance of his superiors to whom he eventually reported. There can be no doubt that this file ought to have been made available to the defence in order for them to get a true picture of the individual whose credibility was to determine the outcome of the case. It would have been of some importance, for example, to know the identity of the person or persons whom he had accused of threatening him – an accusation that Inspector Thomas had found to be false.

[51] Assistant Commissioner of Police Felice did something else that was very strange. He said he had the house of the appellant searched in the appellant's absence, while the appellant was in the custody of the police at Horizon Park. Mr Felice said he was not present at the search. All the items that were taken, he said, are documents. No one was present at this search on behalf of the appellant, nor was there a Justice of the Peace to observe the proceedings. Further, no list was made of the documents that were removed. This is another critical aspect of the case, in view of the defence of the appellant that he had a legitimate loan transaction with the deceased Miller, and that the transaction had been reduced to writing. Not only had it been reduced to writing but it had been witnessed and reviewed by a Justice of the Peace. The appellant was not able to produce this document due to the search of his premises and the removal of items therefrom. The appellant had also said that he kept notes of payments received on the loan in diaries which were at his residence. He was not in a position to produce these either.

[52] Fairness involves the exclusion of inadmissible evidence especially when such evidence is prejudicial. In the instant case, the prosecution's chief witness, Tafari Clarke, was allowed to give unsubstantiated prejudicial evidence which must have coloured the judgment of the learned Senior Resident Magistrate. She was told that the appellant was "a dangerous man" who had "all the gunmen on both sides and the police". There was no stated basis for this statement. This witness also referred to his deceased uncle as "a hitman and murderer". Here again, there was no proven basis for that statement. Paul Wilson, a tenant of the deceased, had a different picture as he regarded the deceased as an honest person. We are of the view that the unsubstantiated prejudicial statements of the witness Tafari Clarke in relation to the appellant and the deceased (with whom he had the transaction in issue) were grossly unfair and must have had a negative impact on the proceedings.

[53] Earlier, mention was made of the fact that the defence had sought disclosure of the devices used for recording the conversations. This was denied and is the source of complaint before us. We do not see the need to rule on whether such disclosure ought to have been made, given the view that we take of the process. There is an admission that there have been deletions and omissions in respect of the recordings and transcriptions that were put in evidence. We are of the view that where recordings are made and are being relied on to prove a case, the entire recordings and the context are to be placed before the court for a determination to be made by the court on the question of relevance. It is not a matter for the investigator to determine.

[54] As for the content of the recordings, we do not think that they assisted in proof of the case as they merely confirmed that Tafari Clarke made payments of money on a monthly basis to the appellant and, on occasions, he did not pay the sum due. We found it interesting that it was Tafari Clarke who made all the calls to the appellant with a view to making the payments.

[55] The learned Senior Resident Magistrate found the witness Tafari Clarke to be a witness of truth. This finding flies in the face of the following facts:

1. he told Assistant Commissioner of Police Justin Felice that he was a co-owner of the plaza (when he was not);
2. he at one stage said he had never received any money from Mr Felice when in fact he had received \$10,000.00 to pay his rent;
3. in support of his application for asylum in the United Kingdom, he made false statements as found by Inspector Thomas, that his life had been threatened; and
4. in his evidence he said he gave the appellant money on the same day that he had seen Inspector McDonald, but in his written statement he said the first payment was at the end of the month after the meeting with the inspector.

[56] We found it strange that the learned Senior Resident Magistrate rejected the evidence of both Justices of the Peace and accepted that of Tafari Clarke, a proven teller of false tales. In the case of Mr William Morgan, a retired teacher and a lay magistrate, he did not know the appellant before the deceased Leonard Miller brought him to his house on a Sunday in 2003. It will be recalled that Mr Morgan was a

neighbour of the deceased. In the circumstances, we think it was unreasonable for the learned magistrate to reject the evidence of Mr Morgan that he saw the document evidencing the loan transaction, and gave the parties advice thereon. In respect of Mr Herbert Garriques, also a teacher, it is accepted that he was involved in the receipt and disbursement of rental monies at the plaza. He said he had instructions to pay the appellant a monthly sum until he had disbursed \$220,000.00. We think it was also unreasonable for the learned Senior Resident Magistrate to have rejected the evidence of this witness.

[57] Finally, there is the question of the charge itself on which the appellant was convicted. It states that the appellant corruptly accepted money for offering protection to Tafari Clarke and his premises which were under threat by Terry. There is absolutely no evidence of Tafari Clarke or the premises being under any form of threat by Terry or anyone else. Tafari Clarke gave no evidence of any threat to him or the plaza. If the plaza was under any threat one would have expected some evidence to that effect from a tenant or someone familiar with the operations there. There was nothing of the kind.

[58] Given all that we have analysed, we are satisfied that the conviction cannot stand. The appellant was not treated fairly by the police as the conduct of his defence was hampered by their actions. Further, the verdict was unreasonable in that the evidence of Tafari Clarke ought not to have been accepted, given the limited disclosed antecedents, in preference to that of the two Justices of the Peace.

[59] Accordingly, we allow the appeal, quash the conviction, set aside the sentence and enter a judgment and verdict of acquittal.